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No. 88-1660

In the Supreme Court of the United States

OCTOBER TERM, 1988

NICHOLAS MARINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence at trial supported petitioner's request for an entrapment instruction.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 868 F.2d 549.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1989. A petition for rehearing was denied on March 13, 1989 (Pet. App. 20a-21a). The petition for a writ of certiorari was filed on April 12, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was con-

victed of conspiring to deal in stolen securities, in violation of 18 U.S.C. 371, and disposing of stolen securities, in violation of 18 U.S.C. 2315. He was sentenced to concurrent terms of 18 months' imprisonment and a fine of $5,000. The court of appeals affirmed. This Court vacated that judgment and remanded the case for reconsideration in light of *Mathews* v. *United States*, 108 S. Ct. 883 (1988). On remand, the court of appeals again affirmed.

1. Morris Swirsky became a government informant following his arrest for possession of stolen securities. The FBI directed him to attempt to purchase additional stolen bonds. Swirsky told Paul North, a stockbroker, that he was interested in buying "deep discount" bonds. North then introduced Swirsky to petitioner, a practicing tax lawyer. Swirsky asked petitioner to help him buy the "deep discount" bonds for clients with large amounts of cash. Pet. App. 3a. Swirsky made it clear that his intention was to buy stolen property; Swirsky said that he only wanted bonds that were "usable" and that had not been reported stolen. C.A. App. 763, 1084-1085. Petitioner told Swirsky that he would try to help him. Pet. App. 3a.

Petitioner obtained $975,000 in municipal bearer bonds from one of his clients. Later, Swirsky talked with petitioner by telephone and told him that he had $340,000 to invest, with which he wanted to buy $1 million worth of bonds. Petitioner suggested that Swirsky use an alias "to keep the transaction as nebulous as possible." C.A. App. 763. Swirsky and petitioner then went to petitioner's law office where petitioner asked Swirsky to remove his clothes so that petitioner could check him for body wires. After Swirsky removed his jacket and shirt, petitioner left the room briefly to speak to someone. Petitioner returned, told Swirsky to get dressed, and informed him that he would find what he wanted under the seat of his car. Swirsky returned to his car and found eight $25,000 municipal bonds there. Pet. App. 3a-4a.

Swirsky delivered the bonds to FBI agents who examined the bonds and questioned whether they were authentic. Swirsky then returned the bonds to petitioner and told him that they were unacceptable. A few days later, petitioner called Swirsky and requested a meeting. They met at a hotel where petitioner offered Swirsky ten Federal Home Loan Bonds, each with a face value of $100,000. Petitioner told Swirsky that the bonds had not been reported stolen. Swirsky agreed to pay $350,000 for the bonds. Petitioner then gave Swirsky one of the bonds so that he could determine whether it had been reported stolen. The following day, petitioner gave Swirsky the remaining nine bonds. When Swirsky met with petitioner the next day to pay for the bonds, petitioner was arrested. Pet. App. 4a.

2. At trial, petitioner requested an entrapment instruction. The district court refused to give the instruction, however, because petitioner had denied knowing that the bonds were stolen. Under the law of the circuit at that time, a defendant was not entitled to an entrapment instruction unless he admitted all the elements of the offense. Pet. App. 5a.

The court of appeals affirmed. Pet. App. 5a. This Court then decided *Mathews* v. *United States*, 108 S. Ct. 883 (1988), which held that a defendant need not admit all the elements of the charged offense in order to obtain an entrapment instruction. Accordingly, this Court vacated the court of appeals' judgment and remanded the case for further consideration in light of *Mathews*. Pet. App. 5a.

3. The court of appeals again affirmed. Pet. App. 1a-12a. The court ruled that a defendant is entitled to an entrapment instruction if the evidence would support a finding that the government induced him to commit the crime and that he was not predisposed to commit it. *Id.* at 5a-7a. Accordingly, the court noted that the defendant must produce some evidence that the government induced him to commit the crime. *Id.* at 6a. Here, the court observed, the evidence showed only that a government infor-

mant offered petitioner an opportunity to commit the crime. The court of appeals held that such an offer is insufficient to prove inducement. *Id.* at 11a.

Judge Higginbotham dissented. Pet. App. 13a-19a. In his view, the court should have remanded the case to the district court to determine whether petitioner was entitled to an entrapment instruction. He reasoned that the question whether petitioner had introduced sufficient evidence to warrant an entrapment instruction was a close one that should be decided by the district court in the first instance. *Id.* at 19a.

ARGUMENT

Petitioner contends (Pet. 3-8) that the court of appeals erred in concluding that he introduced insufficient evidence to warrant an entrapment instruction. That fact-specific contention does not merit this Court's review.

1. It is well settled that a defendant is entitled to an entrapment instruction only if the evidence would support a finding that the government induced the defendant to commit the offense. See, *e.g.*, *United States* v. *Coady*, 809 F.2d 119, 122 (1st Cir. 1987); *United States* v. *Buishas*, 791 F.2d 1310, 1313 (7th Cir. 1986); *United States* v. *Busby*, 780 F.2d 804, 806 (9th Cir. 1986). Evidence that a government agent merely "sought out or initiated contact with the defendant, or was the first to propose the illicit transaction" is not sufficient to meet the threshold burden of demonstrating inducement. *United States* v. *Andrews*, 765 F.2d 1491, 1499 (11th Cir. 1985), cert. denied, 474 U.S. 1064 (1986). See *United States* v. *Velasquez*, 802 F.2d 104, 106 (4th Cir. 1986); *United States* v. *Fleishman*, 684 F.2d 1329, 1342 (9th Cir.), cert. denied, 459 U.S. 1044 (1982); *United States* v. *Hill*, 626 F.2d 1301, 1304 (5th Cir. 1980); *United States* v. *Burkley*, 591 F.2d 903, 913-914 (D.C. Cir. 1978), cert. denied, 440 U.S. 966 (1979). Thus, as this Court recognized in *Mathews* v. *United States*, "evidence that government agents merely afforded an opportunity or facilities for

the commission of the crime would be insufficient to warrant an [entrapment] instruction." 108 S. Ct. at 888.[1]

The court of appeals correctly held that petitioner did not produce sufficient evidence on the issue of government inducement. The government informant did no more than contact petitioner through an intermediary and ask him to locate "deep discount" bonds for his clients. Swirsky did not pressure, coerce, or harass petitioner in any way. See Pet. App. 11a. In sum, "Swirsky merely offered [petitioner] the opportunity to commit the offense." *Ibid.* As a matter of law, that conduct did not constitute an inducement to commit the charged offenses; petitioner was therefore not entitled to an entrapment instruction.

2. Petitioner notes (Pet. 7) that the Second Circuit's opinion in *United States* v. *Dunn*, 779 F.2d 157 (1985), cert. denied, 480 U.S. 931 (1987), expresses a contrary view of what constitutes government inducement.[2] In *Dunn*, an undercover agent approached the defendant and arranged to

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[1] By contrast, a defendant may be entitled to an entrapment instruction if he presents evidence showing that he did not favorably receive the government plan and that the government had to "'push' the scheme on" him. *United States* v. *Hammond*, 598 F.2d 1008, 1011 (5th Cir. 1979). See *United States* v. *Timberlake*, 559 F.2d 1375, 1379 (5th Cir. 1977).

[2] Contrary to petitioner's suggestion, the decision below does not conflict with *United States* v. *Fusko*, 869 F.2d 1048 (7th Cir. 1989). In that insurance fraud case, the court of appeals held that the defendant was entitled to an entrapment instruction where the evidence showed that the defendant did not initially agree to submit a false claim to her insurance company but relented only after "repeated telephone entreaties from [the informant] over the following three months." 869 F.2d at 1050. Thus, the informant did more than offer the defendant an opportunity to commit the charged offense; the informant pushed her into committing it. Here, by contrast, Swirsky merely afforded petitioner an opportunity to commit the crime.

sell him cocaine. The defendant initially had no interest in the deal, but changed his mind after the agent assured him that the deal was a "super package" and a "really good deal." 779 F.2d at 159. The district court instructed the jury that a "solicitation[,] request or approach by law enforcement officials to engage in criminal activity standing alone is not inducement." Following the conviction, however, the district court granted a new trial on the ground that its instruction on inducement was erroneous. The court of appeals affirmed and noted that "'soliciting, proposing, initiating, broaching, or suggesting the commission of the charged offence' *does* constitute inducement." 779 F.2d at 158, quoting *United States* v. *Sherman*, 200 F.2d 880, 883 (2d Cir. 1952).

For several reasons, we do not believe that this Court need resolve any difference in the circuit court opinions. First, the Second Circuit's definition of inducement in *Dunn* was not necessary to its decision. In that case, the evidence showed that the government agent persuaded the defendant to commit the offense after the defendant initially expressed no interest in it. Such evidence would justify an entrapment instruction under any accepted view of inducement.

Second, the Second Circuit wrote its opinion in *Dunn* before this Court stated in *Mathews* that "evidence that government agents merely afforded an opportunity or facilities for the commission of the crime would be insufficient to warrant [an entrapment] instruction." 108 S. Ct. at 888. *Mathews*, therefore, casts substantial doubt on the view of inducement that the Second Circuit expressed in *Dunn*. In light of this Court's characterization of what proof of inducement is required to justify an entrapment instruction, the Second Circuit may well abandon the contrary position endorsed in *Dunn*.

Third, even if the evidence were sufficient to show inducement, petitioner nevertheless failed to produce enough evidence of lack of predisposition to warrant an entrapment

instruction. The evidence showed that petitioner was an eager participant in the scheme to deal in stolen securities and that he expressed no reluctance to supply Swirsky with the bonds. Petitioner played an active role in the scheme and took the lead in consummating the transactions. As the court of appeals noted (Pet. App. 11a), petitioner initiated telephone calls to Swirsky, returned Swirksy's calls to complete the securities transactions, suggested hotels as meeting places to discuss Swirsky's proposal, and made the arrangements for the delivery of the bonds to Swirsky. And when Swirsky refused to buy the first set of bonds that petitioner delivered to him, petitioner took the initiative in obtaining and delivering a new set of bonds to him. *Id.* at 4a. Thus, even under the Second Circuit's view of entrapment, petitioner would not have been entitled to an entrapment instruction.

CONCLUSION

The petition for a writ of certiorari should be denied. Respectfully submitted.

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